# Advisory

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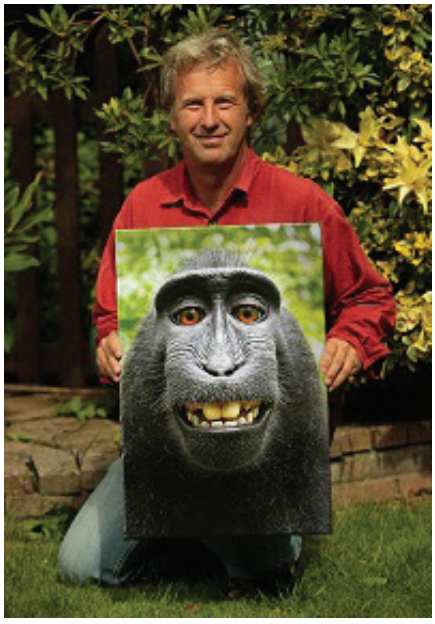
## Who Owns The Monkey Selfie?

Can you copyright a monkey's selfie, even if the monkey stole your camera to take it? That's a question Wikipedia recently had to answer, and it said no, supported by some recent guidance from the U.S. Copyright Office. But it's not clear that Wikipedia got it right.



In 2011, David Slater, a professional British photographer, set off on a photography tour in Indonesia to capture unforgettable images from the wild. He spent three days in the forest building a relationship with the monkeys. He set up his camera, hoping to photograph the monkeys at play. In his words: "I put my camera on a tripod with a very wide angle lens, settings configured such as a predictive autofocus, motorwind, even a flashgun, to give me a chance of a facial close up if they were to approach again for a play." Sometimes things don't go as planned: a monkey ran off with the camera, clicking the shutter in the process.

Mr. Slater is depicted in the image to the left holding a copy of the resulting monkey selfie. While a trained photographer would probably conclude that the selfie required a significant amount of "intellectual labor" and "creative powers of the mind" to capture, Wikipedia and the U.S. Copyright office disagree.

The dispute began when Wikipedia posted the selfie in the "Wikimedia Commons," on the stated ground that it was not subject to copyright since it was taken by an animal. Mr. Slater contends otherwise, saying that he holds a copyright in the image. The U.S. Copyright Office recently weighed in through a comment in its draft of the third edition of "U.S. Copyright Office Practices." In Section 306 ("Human Authorship Requirement"), the Office uses "[a] photograph taken by a monkey" as an example of a work that is not subject to copyright registration because it was not created by a human. The courts have not weighed in on the matter as Mr. Slater has yet to decide whether to file suit.

Copyright as a property right has its origins in the English common law concept "that an Author should reap the pecuniary Profits of his own Ingenuity and Labour." Copyright was first codified by the Statute of Anne

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by Parliament in 1710, which provided an exclusive 14-year period to an author, and it was in this context that the Framers of the U.S. Constitution wrote Article I, Section 8 (The Copyright Clause): "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Copyright jurisprudence has evolved to account for modern media, but not always contemporaneously.

The monkey selfie's copyright prospects will turn on the originality requirement, which in turn requires human authorship. As noted in *Nimmer's Copyright*: "Originality merely requires independent creation by the author and just a scintilla of creativity."

Grey areas abound. Consider two hypotheticals involving the "originality" and "human authorship" requirements. First, assume a human puts paint on the paws of a cat, and sets up a canvas for the cat to walk on. The result is a painting that is painted by the cat, but could not have been created without the actions of the human. Would this painting satisfy the originality and human authorship prerequisites to copyright protection? If so, it is very similar to Mr. Slater's photograph in that it is doubtful a monkey could have selected the camera settings to capture his image at close range with the clarity and balanced lighting of the resulting image. The Copyright Office has not delineated the point at which sufficient human "intellectual labor" has been expended to warrant a copyright.

A second hypothetical is illustrated by the images above. The image to the far left is the original monkie selfie while the one to the near left is a heavily "Photoshopped" version developed by the authors for

purposes of illustration only. Suppose Mr. Slater had kept the original selfie away from the public eye, and only released the Photoshopped version. Does Photoshopping add sufficient originality and human authorship to qualify the image for copyright protection? That would be a strange result, granting an image edited after the fact protection superior to the original image itself.

A trained photographer will recognize that the original monkey selfie was not taken on a camera's automatic setting. The critical step in its creation was the photographer's actions in setting up the camera, which required "creative powers of the mind" and significant "intellectual labor." To paraphrase Judge Posner, government authorities "can make fools of themselves pronouncing on aesthetic matters." Time will tell whether the Posner admonition applies to Wikipedia and the Copyright Office.



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